UNITED STATES
v.
KENDRICK HOLDER

IBLA 86-117 Decided December 2, 1987

Appeal from a decision of Administrative Law Judge Robert W. Mesch, declaring the Lora Nos. 13, 14, and 15 lode mining claims invalid. AZ 19177-1.

Affirmed.

1. Administrative Procedure: Hearings -- Hearings -- Mining Claims: Contests -- Rules of Practice: Appeals: Hearings

   A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

2. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability -- Mining Claims: Marketability

   In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

3. Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Marketability

   Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

4. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability

The holding of a mining claim solely as a reserve for speculative future development does not impart validity to the claim.

APPEARANCES: Robert Duber II, Esq., Globe, Arizona, for Kendrick Holder; Lawrence A. McHenry, Esq., Department Counsel, Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Kendrick Holder has appealed from a decision dated September 20, 1985, by Administrative Law Judge Robert W. Mesch, declaring the Lora Nos. 13, 14, and 15 lode mining claims (A MC 221324 through A MC 221326), situated in the NW 1/4 SE 1/4 of sec. 26, T. 1 N., R. 15 1/2 E., Gila and Salt River Meridian, Gila County, Arizona, invalid for lack of discovery of a valuable mineral deposit on the claims.

On August 1, 1984, the Bureau of Land Management (BLM) issued a contest complaint charging that the subject claims were invalid for lack of discovery of a valuable mineral deposit. Appellant denied the charges and an evidentiary hearing was held before Judge Mesch in Phoenix, Arizona, on May 21, 1985.

According to the record, appellant located these claims on May 1, 1984, with the thought of selling them to Inspiration Consolidated Copper Company (Inspiration) (Tr. 123, 148). Appellant also located a group of claims immediately to the north and another group immediately to the west of the claims here at issue. Appellant sold the northern group to Inspiration shortly after location (Tr. 145). He held the western group but neither produced nor sold any minerals from that group of claims (Tr. 144).

William Nelson, a BLM mining engineer, examined the claims in question in May 1984 and February 1985 and gathered samples (Tr. 8, 11-12). Assay results showed small amounts of gold, silver, copper, manganese, aluminum, and iron. Three samples showed a silica (Si O[2] content above 90 percent (BLM Exh. 2, Tr. 23). Silica is used as a flux in copper smelters. Having received the assay results, Nelson contacted James Lundy, a mining engineer for Inspiration, to inquire whether the silica from appellant's claims could be used in the company's smelters (Tr. 27). After speaking with Lundy, Nelson determined that no market existed for appellant's silica. He gave his opinion that a prudent man would not spend time and effort to develop the claims (Tr. 28).

In testifying for appellant, Lundy stated that the copper smelting business in Arizona had decreased significantly since the 1960's and that the future of the business did not look "very good" (Tr. 95). He stated that Inspiration constituted "the market" for silica flux in the area, that it had 48-50 unpatented claims it was holding that contained materials which could be used for silica flux, and currently had three suppliers under contract to provide its silica needs (Tr. 86, 87). Lundy testified that the current

supplies of flux in the area were sufficient for Inspiration's needs for the next 5 to 10 years (Tr. 112). He stated that any interest that Inspiration might have had in the contested claims would have been for use in the far future (Tr. 113). While Lundy testified that leasing the contested claims had been considered, this was with the thought of simply adding to Inspiration's reserves, not with the thought of going in and immediately using the property (Tr. 114, 115).

Based on the evidence, the Judge declared appellant's claims invalid because appellant failed to meet his ultimate burden of establishing the discovery of a valuable mineral deposit.

On November 25, 1985, appellant filed a statement of reasons in support of an appeal from Judge Mesch's decision. On December 16, 1985, counsel for appellant filed a motion to stay consideration of the appeal pending consideration of a motion for rehearing which he had filed with Administrative Law Judge Mesch. By memorandum dated December 17, 1985, Judge Mesch referred the motion for rehearing to the Board, noting that "I do not believe I have any jurisdiction to rule on the contestee's motion for rehearing." On December 27, 1985, counsel for BLM filed an answer to appellant's statement of reasons in support of the appeal as well as a statement in opposition both to the motion to stay the appeal and the motion for rehearing.

By order dated January 6, 1986, the Board denied appellant's request for a stay of consideration and for rehearing. The Board, however, granted appellant 30 days within which to make a proffer of evidence he would produce at a new hearing and to explain why such evidence was not tendered at the original hearing.

On February 13, 1986, appellant filed with the Board a February 7, 1986, affidavit of James Lundy. In the affidavit, Lundy stated that mining activity "to the extent of several hundred tons per week" was being conducted on property adjacent to the Lora claims. In light of expanded operations, Lundy concluded it was "more likely" that the claims at issue "would be attractive for exploration and development by Inspiration Consolidated Copper Company." BLM's response to the affidavit, filed February 24, 1986, argues that it "adds no new testimony that was not tendered during the hearing in May, 1985, except that Inspiration is currently working its reserve claims north of Appellant's."

[1] In United States v. Whitney, 51 IBLA 73, 88 (1980), the Board addressed the issue of when a second hearing will be granted, quoting from United States v. Syndbad, 42 IBLA 313, 322 (1979):

> A second hearing will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he actually was present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. Cf. United States v. Johnson, [33 IBLA 121 (1977)]. A petition to reopen a hearing for submission of further evidence will be denied when the contestee offers no valid justification for the neglect to offer evidence

> which was or could have been available at the original hearing. United States v. Hanson, 26 IBLA 300 (1976). A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery of a valuable mineral deposit. United States v. Mattox, 36 IBLA 171 (1978).

We conclude that Lundy's affidavit contains nothing to suggest that a rehearing would produce a different result. At best it indicates Inspiration's management might decide to lease or purchase appellant's claims sooner than indicated in Lundy's testimony at the hearing. Accordingly, we again deny appellant's request for another hearing.

In his statement of reasons, appellant argues that invalidation of his claims was a discriminatory action against a small miner. Citing United States v. Corns, 53 IBLA 5 (1981), appellant also argues that the land embraced by his claims is mineral in character and that the extraction of those minerals would be profitable.

[2] In United States v. Aiken Builders Products, 95 IBLA 55, 57-58 (1986), the Board set forth the conditions that must be met to establish the discovery of a valuable mineral deposit:

> In order to support a discovery of a valuable mineral deposit, the evidence must disclose a discovery of a deposit such that a man of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1894). As the Supreme Court recognized in United States v. Coleman, [390 U.S. 599] at 602 (1968), the purpose of the mining law is to reward and encourage discovery of minerals which are valuable in an economic sense -- minerals which no prudent man would extract because there is no demand for them at a price higher than the cost of extraction and transportation are not economically valuable. Hence, the marketability test, i.e., whether the mineral deposit can be mined, removed, and marketed at a profit, has emerged as the logical complement to the prudent man test. Id. at 602.

[3] Under the marketability test, a mining claimant "must show that as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). For the reasons set forth below, we conclude that appellant has not made this showing.

Appellant relies upon United States v. Corns, supra, wherein we stated: "Land is mineral in character only when conditions engender the belief it contains minerals of such quality and quantity as to render its extraction profitable and justify expenditures to that end." Id. at 8. Appellant has not shown that under Corns, the mineral contained in his claims could be extracted and sold at a profit. The testimony of appellant's witness at the

hearing indicated that Inspiration was "the market" for silica flux in the area and that any interest Inspiration would have in appellant's claim would be for use in the far future. While Lundy's affidavit of February 7, 1986, states that it is now "more likely" that Inspiration would consider the claims attractive for exploration and development, this statement does not, in our view, constitute sufficient evidence to show that appellant has met the requirements of the marketability test. The most that can be said regarding appellant's evidence of marketability is that it shows there is a possibility that extraction of the mineral may be profitable at some future time. This speculative evidence falls short of showing, as a present fact, that there is a "reasonable likelihood of success" that the claims can be mined at a profit. See In re Pacific Coast Molybdenum, supra.

[4] Further, the record in this case shows that no present market for the mineral has been demonstrated and that future marketability is speculative. The holding of a mining claim solely as a reserve for speculative future development does not impart validity to the claim. See Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Taggart, 53 IBLA 353 (1981).

Finally, we find no merit in appellant's argument that invalidation of his claims was a discriminatory action against a small miner. Appellant cites the deposition of Jack Eastlick, a geologist employed by Inspiration, who stated that mining claims located near the claims in dispute, owned by Inspiration, were validated by BLM in the 1970's. The validity of appellant's claims must be established by a showing that the material on his claims, not some other claims, can be mined, removed, and marketed at a profit. See United States v. Kaycee Bentonite Corp., 64 IBLA 183, 223, 89 I.D. 262, 284 (1982).

We therefore conclude, as did Judge Mesch, that appellant has not met his burden of proof in establishing that the claims in question have been perfected by the discovery of a valuable mineral deposit. See United States v. Springer, 491 F.2d 239 (9th Cir. 1974); Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

Will A. Irwin
Administrative Judge.